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AUTHOR Schmidt, Benno C., Jr.
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ABSTRACT

In applying First Amendment protections to the broadcast industry, the Supreme Court has adopted a hands-off policy, but increased concentration and centralization has brought into question the diversity and freedom of flow of information. Market pricing, complete government regulation, and restricted access are three alternatives for regulatory schemes. Since the first two alternatives are illegal, the Federal Communications Commission has attempted to resolve First Amendment issues with formulas that determine access to broadcasting. Requiring diversity of programing, insuring equal access for political candidates, and the fairness doctrine are examples of this strategy. This monograph considers court cases that elucidate these legal principles. (EMH)

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Diversity and Autonomy: The First Amendment in Broadcasting

Benno C. Schmidt, Jr.
Professor of Law
Columbia University

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

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Diversity and Autonomy in First Amendment Theory

Perhaps the most common ingredient in the Supreme Court's approach to problems of freedom of expression has been laissez-faire thinking. The Bill of Rights generally reflects a conception of liberty as a collection of negative controls on official power. The First Amendment's scope has been thought limited to official interference with free expression. The Supreme Court has tended to justify official non-interference with speech and the press not as a good principle in itself, but rather as a utilitarian policy that will bring about good results for society. The First Amendment judicial tradition, entirely a product of the twentieth century since no case raising First Amendment issues came to the Supreme Court before 1900, has centered on cases involving political expression. In building principles and a rhetoric of freedom of political expression, the Supreme Court turned to considerations of social utility rather than freedom of conscience. Holmes and Brandeis sought to persuade their brethren on the Court to protect speech largely on pragmatic grounds of social value. They offered the premise that "a multitude of tongues" protected by the First Amendment from governmental interference, would naturally tend to produce diversity of expression in which all shades of opinion could compete for political or cultural acceptance. The "marketplace of ideas" was the resulting metaphor, and it remains the dominant imagery in the rhetoric of freedom of expression. Individual speech should be protected because it brings diversity, competition, and therefore efficiency to political decision-making and to

the collective search for truth, not because it is a manifestation of personal autonomy on which the state may not impinge.

The trend toward concentration and centralization of the communications media challenges the premise that a laissez-faire marketplace of ideas serves the goals of the First Amendment. If the nature, the structure, and the economics of modern mass communications are such that only a few can enter the marketplace, then the negative conception of the First Amendment as a protection against government interference no longer ensures diversity of expression. As communications media become ever more concentrated, centralized, and remote, many have called for an affirmative stance by government towards diversity of expression, through access obligations (under which a publication would be obligated to present the views of someone it would not present as a matter of editorial discretion) and other direct government action designed to prime the marketplace of ideas.

For many reasons, doubts about the efficacy of a laissez-faire approach to diversity of expression, and readiness for affirmative official action, have always been strongest with respect to broadcasting. For one thing, radio and television operate in a legal milieu that is quite different in its regulatory tendencies from that of the print media. Almost from the beginning, broadcasting has fallen under the aegis of an administrative agency. As Professor Kenneth Davis has pointed out, "the administrative process is always a tool for positive government, never a tool for laissez-faire." The natural tendency to positive government of an administrative agency, charged with overseeing communications

media under both constitutional and statutory mandates to honor principles of free expression, has produced the fascinating spectacle of affirmative efforts to guarantee by law the goals of the First Amendment while wrenching it from its traditional laissez-faire moorings.

Moreover, the perception of scarcity of outlets for expression has always been the starting point for analysis of the legal and constitutional statutes of broadcasting. As the Supreme Court stated in the formative NBC decision in 1943:

> Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied.

However dubious economists may be about the perception, officials and most of the public have regarded the electromagnetic spectrum as intrinsically scarce in some sense that land and printing presses are not. Thus, the law of broadcast regulation has since 1927 been grounded on notions of scarcity, barriers to entry into the marketplace of broadcast expression, and public ownership of the airwaves. These notions contradict the premises of the First Amendment's laissez-faire conception of a free marketplace for ideas.

Moreover, public perceptions of subjectivity, antagonism to government, and absence of diversity that have disturbed journalism's traditional image of objectivity have been especially acute in the case of television. Television, by its nature, offers an extremely compressed and personalized version of the news. The three network news shows draw a combined audience of more than 50 million persons each night. By comparison,

the New York Times sells about 2 million copies each day, while a best-selling book reaches 100,000 to 500,000 homes. Besides attracting the largest audience of any news medium, television has with regularity strengthened its position over competing news media as the primary source of information about public affairs for most Americans.

Proponents argue that guaranteed entry into modern mass communications media, and especially to television, will increase diversity of expression, and that access obligations accordingly should be viewed as consistent with, and even supportive of, the First Amendment. Opponents of access tend to accept the premise that the First Amendment favors diversity of expression, but argue that access obligations will produce chilling effects or expand official supervision of expression, and that either of these effects, in the long run, will restrict diversity of expression. But is the goal of diversity of expression the only basis for analyzing the constitutionality of access obligations?

When the First Amendment is considered generally, it is clear that instrumental policies favoring the broadest diversity of expression are not an adequate account of the freedoms guaranteed. No one would claim that a Jehovah's Witness who publishes an anticlerical pamphlet should be required to provide access to a Roman Catholic to state his defense of the priesthood.

Do First Amendment guarantees of autonomy with respect to religious belief have some bearing on the question of access in non-religious contexts? The insulation of religious expression from access obligations might be thought to rest on the distinct constitutional text of the religious guarantees; access obligations might be thought closer

to "prohibiting the free exercise" of religion than to "abridging the freedom of speech, or of the press." On the other hand, the "generating background" of the First Amendment, particularly as reflected in the writings of Madison and Jefferson, suggests that freedom of expression and freedom of religion rested on an integrated conception of individual autonomy in matters not appropriate for official regulation.

In at least one great First Amendment decision, West Virginia State Board of Education v. Barnette, the Supreme Court integrated political and religious freedom in a unitary conception of personal autonomy. In holding that school children could not be compelled to salute the flag against their scruples, the majority opinion rested exclusively on freedom of speech, did not even mention the provisions of the First Amendment dealing with religious freedoms, and specifically stated that the issue did not turn on the possession of religious beliefs. Justice Jackson's language is suggestive: ". . . compelling the flag salute . . . invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." In order to sustain the compulsory flag salute, Jackson wrote, the Court would be "required to say that a Bill of Rights, which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."

The aim of this introductory discussion has been to suggest the incompleteness of instrumental approaches to the meaning of the First Amendment. The marketplace of ideas is a powerful constitutional symbol, and a reminder that the First Amendment rests on a more pragmatic base than simple altruistic respect for individual autonomy. However,

the historical tradition of the First Amendment, and important decisions related to this tradition, define a scope for the Amendment that is not instrumental, not designed to promote democratic self-governance, and not aimed to stimulate diversity of expression and efficiency in the search for truth. Against a historical perspective of commitment to religious and political autonomy, required access assumes a more questionable constitutional posture.

Diversity and Autonomy in Broadcast Regulation

Resource allocation and utilization of a most unusual sort are the essence of the Communications Act. A market-pricing system of spectrum allocation was rejected from the beginning. The obvious alternative to market allocation is direct government operation. Yet, despite continuous official rhetoric to the effect that the spectrum is an inalienable part of the public domain, the Navy was not successful in 1910 and 1918 in urging direct government control of the spectrum. Private interests in broadcasting had become entrenched before 1927 when Congress, for the first time, focused on basic issues of spectrum allocation and utilization. Direct government operation of the spectrum was neither practical nor politically feasible.

A third possible method of spectrum management would work toward the goal of open access. Anyone might be allowed to buy, lease, or borrow a transmitter and apply for a particular broadcast time and spectrum space, which would be allocated on some neutral basis, such as "first-come, first-served." However, such an "open access" method of allocation would fractionalize broadcasting. There would be little continuity of programming, and broadcasters would have very little incentive to invest in long-term, quality programming.

Any of these three methods of spectrum management would have provided a coherent rationale for government regulation of broadcasting; the Communications Act is a contradictory mix of the three. Section 301 of the Act authorizes "the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority... " The FCC is authorized by statute to grant licenses and renewals "in the public interest, convenience, and necessity," a phrase borrowed from a statute regulating railroads and grain elevators.

Just as the Act undercuts any basis for broadcaster autonomy in traditional conceptions of private property, it likewise negates the antithetical notion that broadcasters are surrogates for the public at large, or subject to unfettered official control. The Act specifies that licensees are not "common carriers" compelled to accept any message for broadcasting. Moreover, the Act expressly withdraws any "power of censorship" from the FCC, and provides that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." These provisions clearly were intended to give the broadcaster substantial editorial control over programming.

Since our law has rejected both market allocation and exclusive governmental use, the Commission's dilemma is to choose among various candidates for broadcast licenses and somehow to find justification for providing a fortunate few with the use of a valuable, scarce resource at no cost. The conception of the broadcaster as a public trustee is designed to dull the horns of the FCC's dilemma. To give away valuable spectrum rights, with no strings attached, would pose stubborn problems

of justification.

Since programming is by far the most significant aspect of a broadcaster's operation, it is inevitable that public trusteeship obligations will substantially concern programming, particularly about public affairs. The tension between diversity of expression and broadcaster autonomy as legal concepts in the Communications Act and in First Amendment theory applicable to broadcasting are reflected most clearly in the "equal opportunities" provision of section 315 of the Act and in the Fairness Doctrine.

The "Equal Opportunities" Provision

From the Radio Act of 1927 to the present, the statutes regulating broadcasting have required that a licensee allowing use of its station by a legally qualified candidate for office must afford equal opportunities to all other legally qualified candidates for that office. Of the many proposals to impose more extensive access obligations on radio broadcasters, only the equal opportunities provision survived in both the Radio Act of 1927 and the Communications Act of 1934. The equal opportunities access right is contingent, not affirmative. That is, the statute provides that "[n]o obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate." Moreover, the provision does not require equality of actual use by candidates. If one candidate does not care to make use of free air-time, the opponent may nevertheless appear. Similarly, if one candidate is willing to pay for advertising but opponents are not, the station may sell time to that candidate only.

Apart from problems of administration, difficulty for the

Commission has centered on what constitutes a "use" of a broadcast station that triggers equal opportunities for competing candidates. The Commission before 1959 held that even such non-political appearances by candidates as taking a bow on a variety show or selling used cars constituted uses triggering equal opportunities. Such literalism in the service of absolute equality of access among competing candidates also led to rulings that virtually any appearances by candidates in newscasts triggered section 315. The absurd consequences of this approach led Congress in 1959 to exempt from the operation of the equal opportunities provision four kinds of news programs that are under the control of the broadcaster rather than the candidate: (1) newscasts, (2) interviews, (3) news documentaries, so long as the appearance of the candidate is incidental to presentation of the subjects covered, and (4) on-the-spot coverage of news events. These exempted programs are governed now by the general Fairness Doctrine.

Although the 1959 amendment allows considerable freedom to a broadcaster who wishes to feature political candidates in regular news programming without triggering the equal opportunities requirements, section 315 has had a clear inhibiting effect on special political programming during elections. In 1960, the equal opportunities provision was suspended for the presidential campaign, and the three television networks donated over 39 hours of broadcast time to presidential candidates. The 1960 suspension stimulated the four "Great Debates" between Kennedy and Nixon, who appeared before the largest audience ever to witness two candidates for the presidency. In 1964 and 1968, when section 315 was applicable to the presidential elections, the amount of free time given

to candidates was 4 hours and 28 minutes and 3 hours and 1 minute, respectively. Virtually all the 1964 and 1968 appearances were on exempt programs.

The inhibiting effect of section 315 on broadcast debates stems from the American tradition of fringe party candidates. In the 1960 election fourteen minor party candidates for the presidency surfaced on various state ballots. Had section 315 been in effect during 1960, the "Great Debates" either would have been enlivened by candidates for such parties as the American Beat Consensus and the Prohibition Party, or else stations would have been required to broadcast other special programs giving fringe candidates equal (and therefore free) opportunities for expression. It is not surprising that broadcasters in 1964 and 1968, faced with the economic burden of providing free time to numerous fringe candidates and with airing programs of little interest to a mass audience, declined to afford a significant amount of free time for presidential candidates.

Section 315(a) should be recast in its application to presidential elections. In attempting to guarantee equality for candidates, the Communications Act discourages public debate. The Federal Communications Commission has proposed that section 315 be amended to provide equal opportunities only for presidential candidates who meet some minimal test of potential significance. It may be that frustration with political barriers to reform of section 315(a) lies behind a significant reinterpretation by the FCC in September 1975. The Commission reversed earlier rulings holding candidate debates and press conferences covered by the equal opportunities requirements. Henceforth, the Commission ruled,

such political programming will be regarded as exempt coverage of news events, unless the programming is designed to favor a particular candidate or is clearly not news. The change was justified by reference to a newly discovered Congressional intent to give the 1959 exemption broad scope.

The equal opportunities provision suggests the difficulty of affirmative efforts to guarantee diversity of expression in broadcasting. The effort to ensure equality of access for political candidates has had the effect of reducing serious political expression over the air. It is questionable whether the gains in equality and fairness have been worth the inhibiting effects.

The Fairness Doctrine

The Fairness Doctrine is the most controversial aspect of FCC regulation of broadcast programming. Although general doubts as to the doctrine's constitutionality have been laid to rest by the Supreme Court, there is still much dispute over the wisdom of the doctrine and the most appropriate method for its implementation.

Although a number of early Commission rulings indicated that "the public interest requires ample play for the free and fair competition of opposing views," it was not until 1949 that the FCC gave definitive statement to the Fairness Doctrine. The 1949 report on Editorializing by Broadcast Licensees concluded that the public interest imposes a two-part duty on broadcasters: (1) to devote reasonable time to the coverage of controversial issues of public importance, and (2) to afford reasonable opportunity for contrasting viewpoints to be heard on these issues. However, the report included a vital administrative doctrine

which was premised on the Communications Act's rejection of censorship and common carrier status for licensees. Implementation of the Fairness Doctrine was confided to the editorial discretion of the licensee. The Commission stated that it would overturn the licensee's judgment on a fairness question only when the licensee's overall performance constituted an abuse of discretion. Under the 1949 statement, no particular program had to be "fair" if overall programming on an issue met the test of fairness. Complaints about lack of fairness would be reviewed at renewal time against the perspective of the broadcaster's entire performance.

During the 1960's, the FCC departed from its 1949 standards in several significant ways, which moved the Fairness Doctrine toward an access rationale. In 1962 the Commission began considering fairness complaints promptly, rather than waiting until the broadcaster's license renewal date. Like many shifts in procedure, this one brought substantive changes in its wake. Prompt consideration of complaints was not intended to diminish the editorial discretion of the licensee, but it soon had that effect. Case-by-case review of fairness complaints tended naturally to focus more on particular programs than on the broadcaster's overall performance. This particular focus, in turn, engendered pressures for particular remedies for one-sided broadcasts.

The Commission also began to impose explicit access obligations as the means of carrying out fairness obligations when a station had attacked the integrity of public officials or editorialized on one side of an election issue. The personal attack episode that eventually led to the Supreme Court's Red Lion decision was one such ruling. Shortly

after this ruling, the Commission initiated hearings on new general regulations to reflect the new rulings on personal attacks and editorials.

The result was that, in 1967, two specific access regulations were declared, which remain in effect today. According to the first, when a broadcaster takes an explicit position for or against a political candidate in an editorial, he must notify the candidate opposed, or the rivals of the candidate supported, and offer them an opportunity to respond. The second access requirement has broader significance. It specifies that "[W]hen, during the presentation of views on a controversial issue of public importance, an attack is made on the honesty, character, integrity or like personal qualities of an identified person or group," the person or group attacked must be given notice, a transcript of the attack, and an opportunity to respond. In these two administrative rules, contingent rights of access were extended beyond the equal opportunities rights for political candidates provided by section 315(a).

The Red Lion episode and the personal attack access rules caused the Supreme Court to consider the constitutional and statutory rationales underlying regulation of radio and television for the first time since the NBC decision in 1943. An enthusiastic vindication of the FCC followed when the Supreme Court unanimously upheld both the order of free reply time in Red Lion, and the FCC's editorializing and personal attack rules. As a matter of statutory interpretation, the Court held these access rules to be consistent with the legislative intent of the Communication Act.

The broadcasters' First Amendment claims of autonomy as a barrier to the personal attack and editorializing rules were swept aside. The

Court declared:

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish....
>
> It is the right of the viewers and listeners, not the right of the broadcaster, which is paramount....It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.

The sweeping opinion in Red Lion invited speculation over whether the Court had perceived a new basis for regulation of the electronic media. Before Red Lion, the editorial autonomy of licensees, although subject to overall official supervision, had been a prominent value in Commission and judicial rationales of broadcast regulation. The Red Lion decision ignored this aspect of the traditional understanding, and the editorial autonomy of broadcasters simply disappeared in the Court's opinion. Instead of a public trustee, the broadcaster was viewed as a public proxy.

Although the FCC's authority to impose access obligations on broadcasters was clear after Red Lion, the Commission's actual experience with access rights has proved discouraging. When the FCC moved toward the creation of rights of reply to presidential broadcasts, it found itself caught in a ridiculous spiral which seemed to call for rights of reply to an initial reply voluntarily granted by broadcasters. The upshot was a blistering reversal by the D.C. Circuit Court of Appeals. One year later, the Commission announced that only traditional fairness obligations would be deemed generated by presidential broadcasts. The creation of

new access rights on an administrative level was rejected.

Access has also been tried and rejected as a substitute for the traditional Fairness Doctrine approach to commercial advertising. In a 1967 ruling that now appears aberrational, the Commission held that broadcasters who carry ordinary cigarette commercials must also air counter-commercials indicating the health hazards of smoking. Having ordered counter-commercials as a fairness obligation, the FCC faced some hard questions. First, the FCC had to decide how many counter-commercials were required. It rejected the idea of parity, but then realized that governing the counter-commercial obligation by manageable standards required obviously arbitrary line-drawing.

The cigarette counter-commercial ruling also raised a second problem: How might this principle affect commercials for other products posing potential dangers? The FCC apparently did not enjoy its exercise in counter-advertising for it resolutely refused to order counter-commercials again as a balance for other products' commercials. And, in 1974, the FCC rejected the concept of required counter-commercials across-the-board.

The FCC's retreat from access obligations in the areas of political broadcasts and commercials has not led it to reconsider the personal attack and editorializing rules sanctioned by Red Lion. However, there are indications here also that access requirements have shortcomings. Not all personal attacks trigger the access obligation. The only attacks covered are those that occur within the context of a discussion of a controversial issue of public importance. The aim of these rules is not to vindicate the victim of a personal attack, the law of defamation is left with that task. Rather, the personal attack rules simply specify

Fairness Doctrine requirements in a particular situation. The aim is to inform the public about issues of general importance. The theory of the rules is that, when an attack occurs during discussion of such an issue, the target of that attack is the best person to give the public another point of view. As an extrapolation from the Fairness Doctrine, the requirement that a personal attack be related to a public issue is critical to justifying the rules. However, whether discussion of a controversial issue of public importance is involved, and whether an attack is connected to such a discussion, are questions of great difficulty for predictable administration.

Another troublesome question concerns the kind of comments that should be judged as personal attacks. The rules apply to "an attack. . . upon the honesty, character, integrity or like personal qualities of an identified person or group." Commission decisions indicate that the language of the regulation encompasses attacks relating to moral turpitude, but not to derogatory comments about an individual's ability or intelligence, nor even to offensive hyperbole reflecting strong disagreement.

The second major problem with the personal attack rules has been their chilling effects on expression about public officials and public affairs. The Supreme Court has recognized the chilling effects of a state right-of-reply statute applicable to newspapers quite similar to the personal attack rules, and invalidated the statute on this ground. And the Commission itself has, in effect, recognized the chilling potential of the personal attack rules. It has exempted most news programming from the rules because their requirements "would be impractical and might impede the effective execution of the important news functions of licensees."

Access rules respecting political editorializing are less troublesome than the personal attack rules because vagueness and unpredictability of administration are not a problem. Nevertheless, these rules too almost certainly have the effect of seriously inhibiting broadcast editorials. When a number of candidates are in competition, the rules restrain political editorializing in favor of one candidate in the same way that section 315(a)'s equal opportunities requirement has inhibited broadcasters from giving free air time to presidential candidates.

Not only have the access requirements imposed by the FCC proved difficult to cabin, problematical to administer, and dubious in terms of First Amendment values, but this type of direct administrative regulation of programming runs counter to the Supreme Court's latest statement on the law of broadcast regulation. Two cases joined for decision under the name Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm. tested the legality of broadcasters' refusals to accept non-candidate-oriented political advertisements on an equal basis with commercial ads.

The broadcasters' refusal to air the ads was upheld by the FCC. The Fairness Doctrine was interpreted as granting access rights to particular parties only in matters falling within section 315(a) or the personal attack and editorializing rules. The District of Columbia Court of Appeals reversed the Commission in an opinion of great potential sweep by Judge J. Skelly Wright. Judge Wright viewed broadcasters as analogous to "state action," and applied a somewhat diluted version of the equality principle developed in the public forum cases. Because the broadcasters had accepted product commercials, Judge Wright held that they could not flatly refuse to air all non-candidate-oriented political ads.

The Supreme Court emphatically reversed the Court of Appeals. It offered a new perspective on broadcast regulation, one which constituted a significant departure from the theory of Red Lion. Chief Justice Burger, joined by Justices Stewart and Rehnquist, rejected the argument that broadcasters constitute "state action" because of the licensing system. Justice Douglas essentially agreed with this position. These four Justices thus rejected the analogy between the broadcasters and the public forum cases. Justices White, Powell, and Blackmun found the state action question unnecessary to decide. They believed that the traditional Fairness Doctrine, which did not require access in these circumstances, was sufficient to meet First Amendment demands even if licensees were considered to be state action. (Chief Justice Burger and Justice Rehnquist also subscribed to this view.)

Although the Court in B.E.M. -- DNC is fragmented, important themes about the First Amendment and electronic media emerge from the majority coalition. Chief Justice Burger, joined by Justices Stewart, Rehnquist, and White, strongly supported broadcaster editorial autonomy and was sharply critical of access requirements:

> [S]o sweeping a concept of governmental action would go far in practical effect to undermine nearly a half century of unmistakable congressional purpose to maintain -- no matter how difficult the task -- essentially private broadcast journalism held only broadly accountable to public interest standards....
>
> [I]t would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents. . .

However, the Chief Justice was careful not to exalt broadcaster autonomy beyond the reach of regulation. Nor did he shut the door to access requirements: "Conceivably at some future date Congress or the Commission -- or the broadcasters -- may devise some kind of limited right of access that is both practicable and desirable." Although he did not grant broadcaster autonomy the status of a constitutional guarantee, Chief Justice Burger clearly viewed autonomy as an essential value in the existing statutory scheme of broadcast regulation.

Justices Stewart and Douglas went beyond the other Justices in the majority. They saw First Amendment principles as barring access requirements to all branches of the communications media.

Only Justices Brennan and Marshall maintained that the broadcasters' ban on political advertisements violated the First Amendment. They insisted that broadcasters constitute state action in the constitutional sense, and contended that the First Amendment required a balancing of "the competing interests of broadcasters, the listening and viewing public, and individuals seeking to express their views over the electronic media."

Thus, the attitude toward access rights of a substantial majority of the Supreme Court in the B.E.M.-DNC decision ranged from skepticism to downright hostility. It is a remarkable contrast to the enthusiasm with which a unanimous Court had embraced access only four years earlier in Red Lion. Admittedly, the holdings of the two decisions are consistent. In each, the Constitution was disclaimed as the wellspring of decision, and the position of the FCC was sustained. However, in the B.E.M.-DNC decision, the Court criticized access obligations for the electronic media

as contrary to both the premises of the Communications Act and the spirit of the First Amendment.

In Red Lion, the Court intimated a rationale for regulation that viewed broadcasters as proxies for the public, with no rights of autonomy over their temporarily licensed frequencies. Access obligations were judged as consistent with this proxy theory. But the B.E.M.-DNC decision reverted to a theory of broadcast regulation, grounded in the legislative history of the Communications Act, which stressed the editorial autonomy of broadcasters. The current view of the Supreme Court is that broadcasters are public trustees rather than proxies designed to serve as conduits for public expression. Under this trustee theory, broadcasters are obliged to operate in the public interest and are subject to periodic evaluation. However, they are still allowed a considerable degree of discretion and editorial autonomy in day-to-day operations. According to the Court, the Fairness Doctrine serves both as a means of enforcing the public obligations of broadcasters and as a way of preserving a core of editorial autonomy.

After so many difficulties and unhappy experiences, and no doubt moved also by the Court's attitude in B.E.M.-DNC, the Commission has lately become wary of access. There is reason to question, however, whether the Commission has gone far enough in rejecting access rights as an aspect of broadcast regulation. The Commission's 1974 report on the Fairness Doctrine rejected access rights in the context of political addresses and product commercials. Moreover, the Commission was broadly critical of access obligations in general:

Our studies during the course of this inquiry have

> not disclosed any scheme of government-dictated access which we consider "both practicable and desirable." We believe, to the contrary, that the public's interest in free expression through broadcasting will best be served and promoted through continued reliance on the Fairness Doctrine which leaves questions of access and the specific handling of public issues to the licensee's journalistic discretion. This system is far from perfect. However, in our judgment, it does represent the most appropriate accommodation of the various First Amendment interests involved, and provides for maximum public enlightenment on issues of significance with a minimum of governmental intrusion into the journalistic process.

In view of these general rejections of access, one may wonder why the Commission did not discuss the personal attack and political editorializing access rules in this 1974 report. Although the Commission expounded the themes of licensee discretion, nonintrusion in specific programming judgments, and skepticism about the feasibility of access requirements, it made no effort to justify the personal attack and editorializing rules. Yet these rules undoubtedly involve the most significant displacement of licensee discretion, the most economically and administratively burdensome programming obligations, and the vaguest access requirements that have been imposed on radio and television.

As the FCC has moved away from access obligations, it has found other less intrusive means of implementing broadcasters' public responsibilities. The Fairness Doctrine is no longer tied so strictly to access and the notion of reviewing specific programs. The move now is toward evaluation of overall performance. It is shortsighted to view the Fairness Doctrine, without broad access rights, as a pious bromide that will have no effect on the actual operation of broadcasting in the United States. Application of the doctrine in renewal proceedings has been far more effective than specific access rights in opening broadcasting to the views and participation of minority groups.

Prospects For a Unitary First Amendment For Electronic and Print Media

The emergence of cable television is a challenge to our law's traditional preoccupation with the differences between broadcast and print media. Whatever the dubious underpinnings of scarcity as a rationale for distinguishing the broadcast spectrum from other economic resources in terms of regulatory consequences, the emergence of cable has put an end to the notion that television frequencies are scarce by nature in any special physical or economic sense. With cable, it is feasible to transmit a virtually infinite number of channels to any location. Given available cable technology, the number of television channels that any home can receive is limited only by economics -- the costs of capital investment in cable systems and receivers in relation to the return from subscribers and advertisers. The reasons for the scarcity of television channels thus coincide generally with the reasons for the scarcity of newspapers. But if scarcity in the newspaper industry and in television have similar roots, should the two media be brought under the same First Amendment regime?

The Miami Herald Decision

During June 1974, the case of Miami Herald Publishing Co. v. Tornillo gave the Supreme Court its first opportunity to consider the constitutionality of a statute providing a right of access to newspapers comparable to those approved in Red Lion for the electronic media. The case did not call simply for reviewing the comparative constitutional status of broadcast and print media. At issue was whether the Supreme

Court would view the First Amendment as an instrumental policy favoring maximum diversity of expression or as a general guarantee of press autonomy from government regulation.

The Florida statute involved in Miami Herald granted a right of reply to political candidates attacked by newspapers. The Florida Supreme Court had upheld the statute, on the ground that it was

> designed to add to the flow of information and ideas and does not constitute an incursion upon First Amendment rights or a prior restraint, since no specified newspaper content is excluded.

The United States Supreme Court struck down the Florida statute in a unanimous decision. But the opinion for the Court, by Chief Justice Burger, made a greater effort to describe the arguments favoring access guarantees than to refute them. The Chief Justice spoke sympathetically about the trend toward media concentration and the economic barriers to entering the communication industry that have fueled demands for access. But, "however much validity may be found in these arguments," Burger stated, the Florida right-of-reply statute was invalid under the First Amendment, and on two independent grounds. The Court concluded that contingent access obligations of the sort contained in the Florida statute would impose a penalty on newspapers that published criticisms of political candidates, and thus cause a net reduction in public debate:

> The Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. It is correct, as appellee contends, that a newspaper is not subject to the finite technological limitations

> of time that confront a broadcaster but it is not correct to say that as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.
>
> Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced.

This is a striking contrast to the Court's conclusion five years before in Red Lion that a right of reply to personal attacks would enhance public debate, and that the claim of broadcasters that such reply rights would have a chilling effect was "at best speculative." Yet, the Miami Herald decision does not even cite Red Lion, much less explain the contradiction between the two Supreme Court views as to the chilling potential of contingent access rules.

Perhaps because the Court was aware of the inconsistency with Red Lion, it was careful not to rest its decision in Miami Herald on the chilling effect point alone, but added a second reason for its holding:

> Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forego publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors.

What is this "function of editors" that the First Amendment protects from "intrusion"? The Court considered it in two ways. One definition, drawn from the Associated Press case, refers to the invalidity of "compelling editors or publishers to publish that which 'reason' tells them should not be published." The fact that "reason" is set off in

quotes calls attention to what is in any event, a rather odd statement. Editors are not said simply to have a right to decide what goes in or out of a publication; they are said to have the right to do what their "reason" tells them to do. Are these prospective words of limitation? It is easy to think of cases in which an editor's decision not to publish might be regarded by a reviewing court or be categorized by statute as not based on "reason." For example, one might distinguish between a refusal to accept an ad for anti-competitive purposes and an instance in which "reason" counsels against publication. Is the Court suggesting that access obligations might properly overcome "unreasonable" refusals to publish? Perhaps an editor's refusal to publish a correction of an established error of fact might also be judged as not based on "reason."

The Court's second description of the protected "function of editors," at the close of the opinion, is much broader:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials -- whether fair or unfair -- constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

This definition protects any choice to publish or not publish, "whether fair or unfair." There is no hint here that only "reasonable" editorial decisions are insulated from regulation. Thus, the opinion of the Court offers two descriptions of the protected editorial function that differ considerably in their implications for future cases posing constitutional questions about enforced access. The statements of three concurring Justices suggest that the future may lie with the narrower of the two

descriptions -- that description which limits editorial discretion to decisions based on "reason."

That Miami Herald probably does not stand for absolute protection of the print media from all access obligations seems likely when one reflects on the nature of the First Amendment principles in other contexts. An absolutist view of the First Amendment, championed by Justice Black in many vigorous opinions, has never won a majority on the Court. Even in the area of "the central meaning of the First Amendment," which is criticism of the governmental acts of public officials, there is no absolute protection for expression. From the perspective of First Amendment law generally, Miami Herald would be a stark and unexplained deviation if one were to read the decision as creating absolute prohibitions on access obligations. The principle of Miami Herald probably is destined for uncharted qualifications and exceptions.

Miami Herald is the first occasion the Court has had to suggest a guarantee of autonomy under the freedom of the press clause of the First Amendment. Without fanfare, the Court broke new ground when it declared that its decision was not necessarily based on assumptions of the "chilling effects" of Florida's reply statute. The decision indicates the inadequacy of efforts to cast the First Amendment solely in instrumental terms. The Court appears to share Justice Stewart's appraisal, in his concurring opinion in B.E.M.-DNC, of "the dangers that beset us when we lose sight of the First Amendment itself, and march forth in blind pursuit of its values."

A basic question of First Amendment law raised by the Miami Herald decision is whether the constitutional status of radio and television

is ripe for reconsideration. In granting newspapers freedom from access obligations, the Court made no effort to accommodate Red Lion's denial of any such guarantee for broadcasters. Perhaps individual justices had developed different views about access to radio and television and elected not to surround their agreement in Miami Herald with variant statements about broadcast regulation. Also, the decision was handed down at the end of the Court's term during a time of immense pressure, and this too may have discouraged individual opinions. Or, some justices may have wished to postpone reconsideration of Red Lion in light of Miami Herald, especially those not on the Court when Red Lion was decided, to take account of lower courts' reflections on the problem, the possibility of new FCC approaches to the Fairness Doctrine, the reactions of commentators and other sources of insight that ripen over time. Whatever the reasons, the Supreme Court's reticence in Miami Herald has left room for a wide range of speculation about the continuing validity of Red Lion.

At one extreme are those who argue that Miami Herald is simply irrelevant to broadcasting because constitutional decisions pertaining to the print media have no application to radio and television. So Judge Tamm of the U.S. Court of Appeals for the District of Columbia Circuit asserted in the Pensions case. Such a view may have been implicit in the Commission's failure to discuss the Miami Herald decision in its 1974 comprehensive report on the Fairness Doctrine, issued shortly after the Supreme Court's decision.

At the other extreme, one may point to Justice Douglas' statement in B.E.M.-DNC that "TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines." Although

Douglas took that position before Miami Herald was decided, he would no doubt have contended that the decision applied equally to both electronic and print media. A more sophisticated argument to the same effect has been advanced by Chief Judge Bazelon of the D.C. Circuit.

Between these extremes are a variety of efforts to apply the lessons of Miami Herald to the law of broadcast regulation, without making print and electronic media constitutionally indistinguishable on critical issues of access and related fairness obligations. Judge Leventhal's opinion in Pensions represents such an effort. Miami Herald's disapproval of the chilling effects of contingent access obligations and its concern to protect editorial discretion are injected into the Fairness Doctrine, in Leventhal's approach, by means of standards of review of broadcaster judgments which minimize FCC involvement in specific programming decisions. The FCC may not set aside broadcaster conclusions unless they are an abuse of reasonable judgment, while courts will give deference not to the administrative agency but to broadcasters. The recent Straus decision, dealing with the personal attack rules, suggests that this approach of strictly limiting the FCC's scope of review will govern future Fairness Doctrine cases, although two members of the D.C. circuit, Judges Bazelon and Tamm, have already expressed disagreement.

Henry Geller has offered a different approach for applying the lessons of Miami Herald to broadcasting without rejecting Red Lion altogether. He would maintain the legal concept that broadcasters are public trustees with obligations to program in the public interest, but he suggests that the FCC abandon both review of particular broadcasts

and the notion of specific programming remedies for "unfair" broadcasts. Instead, he urges that the FCC review, at the time of license renewal, whether a broadcaster has operated in flagrant or reckless disregard of fairness obligations. If access obligations are to be imposed on broadcasters, then Geller argues for an "open time" approach, under which a particular period would be open on a nondiscriminatory basis "to all those who wish to put on a contrasting viewpoint to the broadcaster's other programming." This type of access, he contends, would minimize official interference with specific editorial judgments.

Conclusion

If the general pattern of First Amendment law is followed, we can neither expect the two branches of the communications media to be joined in a unitary body of constitutional principles, nor can we expect the constitutional status of one branch to be cleanly divorced from that of the other branch. The differences in the legal and economic situations of the two types of mass media are too great for undifferentiated constitutional treatment, yet the similarities in function will not allow total separation. Thus, Miami Herald probably will not apply to the electronic media in any mechanical, total way. But its underlying principles will have force in the law of broadcasting to the extent that they are consistent with the precepts of the Communications Act and the nature of broadcasting.

In terms of both Congress' clear intent in the Communications Act and the leading judicial precedents concerning broadcasting and the First Amendment, the chilling effect rationale of Miami Herald should apply similarly to radio and television as to newspapers. The

assumption of the Court in Red Lion, that contingent reply rights enhance diversity of expression, has been reversed. If the personal attack rules are viewed as inhibiting expression, then they run counter to the instrumental policy of encouraging diversity of expression that Red Lion held to be the essence of the First Amendment as applied to broadcasting.

If such contingent access rights continue to be sustained for broadcasting, despite the chilling effect assumption of Miami Herald, it can only be on the theory that inhibitions of expression of the kind that the First Amendment bars for print media are permissible for radio and television. Diversity of expression for listeners and viewers could not be the basis for continued approval. Rather, rights of reply in broadcasting would have to rest on the notion that regulation of the content of expression, including inhibition of certain types of expression, is permitted for broadcasting though it is not for print media. Such a development in First Amendment theory would have large significance across the entire range of problems of free expression in broadcasting, from obscenity and indecency to libel, as well as a central impact on fairness questions.

The second pronouncement of the Miami Herald decision, that newspapers enjoy a guarantee of editorial autonomy under the First Amendment, will probably not have much effect on the constitutional status of radio and television, although it will reinforce existing trends in the interpretation of the Communications Act. In B.E.M.-DNC, the Supreme Court had already found the editorial freedom of broadcasters to be a prime concern of the Communications Act. However, B.E.M.-

DNC did not undercut the public trustee concept that is the foundation of the Communications Act's licensing system. Moreover, nothing in Miami Herald suggests that the Supreme Court will grant broadcasters the constitutional autonomy enjoyed by publishers. The public trustee concept is virtually inevitable in a system of non-market allocation of valuable temporary rights in the spectrum. If electronic mass media are ever to enjoy the constitutional autonomy of the print media, it will be because new communications technologies make obsolete the system of spectrum allocation we have had since the Radio Act of 1927.

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